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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ARNOLD G. KLEIN

APPELLANT

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Appeal 2008-4575  
Application 10/753,660  
Application Publication 2004/0200130  
Technology Center 3600

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Decided: September 11, 2008

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Before RICHARD E. SCHAFER, SALLY GARDNER LANE, and  
MICHAEL P. TIERNEY, *Administrative Patent Judges*.

LANE, *Administrative Patent Judge*.

DECISION ON APPEAL

**I. STATEMENT OF THE CASE**

The appeal is from a Final Rejection of claims 1-5, 18 and 19. Claims 6-17 are also pending in the application, but have been withdrawn.<sup>1</sup> (App.

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<sup>1</sup> Appellant noted that he has “requested reinstatement of the claims previously withdrawn . . . [but that the] Examiner made no specific comment related to this request.” (App. Br. 3). Because the claims were withdrawn in response to a Restriction Requirement (*see* Office Action mailed Sep. 9,

Br. 3). 35 U.S.C. § 134. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

The application was filed January 9, 2004. It was published on October 14, 2004, as Application Publication 2004/0200130 (“Pub. 2004/0200130”). The real party in interest is said to be Arnold G. Klein. (App. Br. 3).

The Examiner relied on the following references.

<u>Name</u>	<u>Number</u>	<u>Date</u>
Erickson	1,405,822	Feb. 7, 1922
Olson	4,800,671	Jan. 31, 1989

Appellant did not argue against the prior art status of these references.

Appellant appeals the rejection of claims 1, 2, 5, and 18 under 35 U.S.C. § 102(b) over Erickson. Appellant did not argue separately for the patentability of any of the rejected claims. We review claim 1 as a representative claim. *See* Bd. R. 37(c)(1)(vii).

Appellant appeals the rejection of claims 3-4 under 35 U.S.C. § 103(a) over Erickson and Olson.

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2004), any request for rejoinder is reconsidered only after all the claims directed to the elected invention are in condition for allowance. *See* MPEP § 821.04. Furthermore, “[a]fter a final requirement for restriction, the applicant, in addition to making any reply due on the remainder of the action, may petition the Director to review the requirement. Petition may be deferred until after final action on or allowance of claims to the invention elected, but must be filed not later than appeal. A petition will not be considered if reconsideration of the requirement was not requested . . . .” MPEP § 818.03(c).

Appellant appeals the rejection of claim 19 under 35 U.S.C. § 103(a) over Olsen.<sup>23</sup>

## II. FINDINGS OF FACT

The record supports the following findings of fact as well as any other findings of fact set forth in this opinion, by at least a preponderance of the evidence.

1. Appellant's claim 1 recites:

An insect barrier device for use in preventing insect contamination of nectar type bird feeders, said insect barrier device including:

a. a disposable, water-resistant media having an integral mounting hole, wherein said media is coated on at least one surface with a non-drying adhesive layer, said non-drying adhesive layer being sufficiently tacky to act as a physical barrier to the passage of insects, and wherein said coated media is adapted to be placed via said mounting hole on a support for the nectar type bird feeder; and

b. a means for friction fitting the coated media elastically on the support for the nectar type bird feeder, wherein said coated media is adapted to act as a physical barrier to block insect crawling routes along said support for said bird feeder.

(App. Br., Claims Appx. 17).

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<sup>2</sup> The Examiner acknowledged that the rejection of claim 19 is over Olson, not Erickson, as stated in the Grounds of Rejection. *See* Ans. 4 (“In regard to claim 19, applicant is correct that the reference applied is Olson, column 4, lines 31-35.”)

<sup>3</sup> Appellant also addressed the objection made to claim 19 by the Examiner under 37 C.F.R. § 1.75(c). (App. Br. 6). As provided in 35 U.S.C. § 134, we consider claim rejections, not objections. Instead, such objections are petitionable to the Director, under 37 C.F.R. § 1.181.

2. Figure 1 of Appellant's specification is reproduced below.

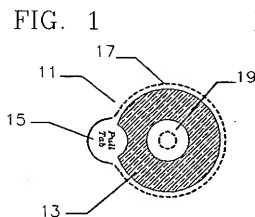
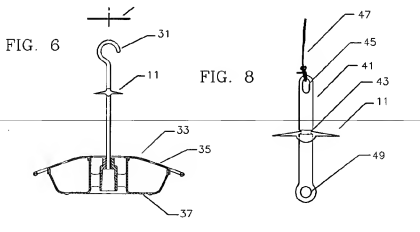


Figure 1 depicts

a simple, completely disposable embodiment of the ant  
 deterring device **11** consisting of the disposable media . . . with  
 the applied insect deterring (non-drying) adhesive pattern **13**.  
 The device **11** has a center hole cut out as shown at **19** and a  
 clearly identified non-adhesive coated region **15** for convenient  
 handling.

(Pub. 2004/0200130 ¶ [0029]).

3. Figures 6 and 8 of Appellant's specification are reproduced  
 below.



4. Appellant's specification provides that

As shown in FIG(S.) 5 and 6 the device 11 may be interference fitted over the hanging hook 31 of the nectar feeder 33.

Alternatively, as shown in FIG(S). 7 and 8 the device 11 may be positioned on a mounting stem 41 at the slightly undercut region shown at 43.

.....  
The ant deterring device 11 is provided with a center hole at 19 for interference fitting with the feeder hanging hook 31 or the mounting stem 41. It is desirable that the device 11 mounting hole 19 have some resilient elasticity to form a continuous contact point or impassable barrier at the mounting point. The vinyl, Tyvek® and thin-flexible foam media may be preferred for the device 11 as they will provide for some elastic expansion and securing friction of the mounting hole 19. Thus, the ant deterring device 11 is provided with means for friction fitting the media elastically on a support for a nectar type bird feeder. An alternative configuration not shown, would use a flexible center grommet or other means to hold the any deterring device 11 directly to the feeder hanging cord 47 or alternative feeder hanging hardware.

(Pub. 2004/0200130 ¶¶ [0030]-[0031]).

5. Figure 4 of Erickson is reproduced below.

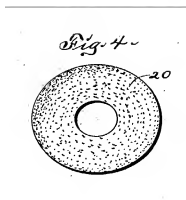


Figure 4 depicts "a plan of a replenishing element" for an insect trap (Erickson, II. 23-24), wherein

[t]he inner surface of the trap member 16 preferably is coated with an adhesive substance such as moist glue as shown by the stippling in Figure 3. The adhesive substance may be applied directly to the inner surface of the trap member or it may be applied to a vehicle such as a paper disk or ring 20, Figure 4, and said ring may be applied manually to the inner surface of the trap member.

(*Id.*, II. 59-65).

6. Figure 2 of Erickson is reproduced below.

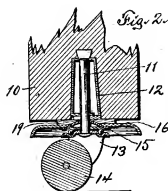


Figure 2 depicts a “vertical section” of a furniture leg with the device for capturing insects (Erickson II. 21-22), wherein a “flexible gasket 19, preferably formed of felt or rubber, may be interposed between the trap member and the furniture leg 10 to stabilize the trap member in its relation to said leg.” (*Id.* II. 51-56).

7. Appellant’s claim 3 recites: “The insect barrier device of claim 1, wherein said barrier device includes a protective covering layer of low adhesion or contact paper.” (App. Br., Claims Appx. 17).

8. Appellant’s claim 4 recites: “The insect barrier device of claim 1, wherein said barrier device media has a handling region that is free from any adhesive coating.” (App. Br., Claims Appx. 17).

9. Olson addresses the problem of insect attracting strips that are “sticky and, therefore, are difficult to handle.” (Olson col. 1, ll. 29-31).

10. Figure 3 of Olson is reproduced below.

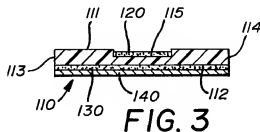


Figure 3 depicts an end elevational view of the insect trapping band, wherein the strip is generally identified by the numeral 110 and has opposed faces 111 and 112 and opposed edge surfaces 113 and 114. Again, a reduced thickness area 115 receives a charge or supply of the insect trapping adhesive 120.

In the FIG. 3 version of the invention, however, a second layer of adhesive 130 is applied to the face 112, and this is covered with a layer of release material, as indicated by the numeral 140. Here again, of course, the strip 110 can be rolled to the FIG. 5 condition, while the release material prevents transfer of the second layer of adhesive 130, and the relative depth dimensions prevent transfer of the insect trapping adhesive 120.

(Olson col. 3, ll. 52-64).

11. Appellant’s claim 19 recites: “The insect barrier device of claim 1, wherein said disposable media is elastic.” (App. Br., Claims Appx. 20).

12. Olson discloses

an insect trapping band, particularly of the type suitable for attachment to the trunk of the tree, and wherein the tree is protected from direct contact with the insect trapping adhesive while the adhesive is maintained in an exposed condition whereby it can serve its function of trapping and destroying the insects.



(Olson col. 1, ll. 61-66).

13. Figure 6 of Olson is reproduced below.

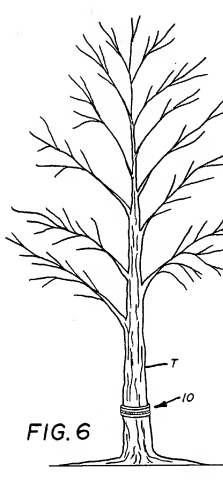


Figure 6 depicts a tree T with an insect trapping band 10 around its trunk.

(Olson col. 3, ll. 36-38).

14. The adhesive taught in Olson is “generally thick and tacky . . . .” (Olson col. 3, ll. 31-32).

15. Olson teaches

the strip 10 [identified as the insect trapping band] has been described as being a flexible material and foam material, such as, polyurethane or non-woven polypropylene, can be used. However, other materials, such as, cotton, burlap and the like,

could equally well be employed with the principal requirement being that the strip is flexible so that it can conform to the outer surface of the tree trunk to which it is applied.

(Olson col. 4, ll. 31-38).

16. Olson teaches that

many trees have rough and uneven surfaces. The flexible, pliable nature of the material of strip 10 will conform to the tree surface and insects will be prevented from passing under the strip and forced to pass over the exposed surface where they will come into contact with adhesive 20.

(Olson col. 3, ll. 44-49).

### **III. LEGAL PRINCIPLES**

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

The Supreme Court has recently noted that "[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variations, § 103 likely bars its patentability." *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007).

### **IV. ANALYSIS**

#### **Rejection of claims 1, 2, 5, and 18**

Appellant's claim 1 recites:

An insect barrier device for use in preventing insect contamination of nectar type bird feeders, said insect barrier device including:

a. a disposable, water-resistant media having an integral mounting hole, wherein said media is coated on at least one surface with a non-drying adhesive layer, said non-drying adhesive layer being sufficiently tacky to act as a physical barrier to the passage of insects, and wherein said coated media is adapted to be placed via said mounting hole on a support for the nectar type bird feeder; and

b. a means for friction fitting the coated media elastically on the support for the nectar type bird feeder, wherein said coated media is adapted to act as a physical barrier to block insect crawling routes along said support for said bird feeder.

(FF<sup>4</sup> 1). An embodiment of the disposable element of Appellant's claimed device is depicted in Figure 1 of the specification as a circular media with a center hole and a region coated with a non-drying adhesive. (FF 2). Figures 6 and 8 of Appellant's specification demonstrate how this disposable element can attach to the support of a bird feeder. (FF 3). Appellant's specification indicates that

The ant deterring device **11** is provided with a center hole at **19** for interference fitting with the feeder hanging hook **31** or the mounting stem **41**. It is desirable that the device **11** mounting hole **19** have some resilient elasticity to form a continuous contact point or impassable barrier at the mounting point. The vinyl, Tyvek<sup>®</sup> and thin-flexible foam media may be preferred for the device **11** as they will provide for some elastic expansion and securing friction of the mounting hole **19**. Thus, the ant deterring device **11** is provided with means for friction fitting the media elastically on a support for a nectar type bird feeder. An alternative configuration not shown, would use a flexible center grommet or other means to hold the any deterring device **11** directly to the feeder hanging cord **47** or alternative feeder hanging hardware.

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<sup>4</sup> Finding of Fact.

(FF 4).

Erickson discloses an insect trap that comprises a paper disk with a hole in the center and moist glue on the surface. (FF 5). Thus, the trap of Erickson includes a disposable media that resists the moisture of the glue and is “water resistant.” The trap of Erickson also includes a “flexible gasket,” made of rubber in one embodiment, for mounting on a furniture leg. (FF 6).

Appellant argued that “[t]he instant invention is specifically “adapted to be mounted on a support for a nectar type bird feeder. The Erickson Insect Trap is specifically adapted to be mounted on a furniture caster. These are distinct functional limitations that set the devices apart.” (App. Br. 7). Specifically, Appellant argued “it is clear that the center mounting hole for Erickson’s trap member 16 and paper ring 20 are simply too large to ‘friction fit’ with continuous contact on a feeder hanging rod 5/32” or typically smaller, irregular cross section feeder hanging cord.” (App. Br. 7-8).

The device recited in Appellant’s claim 1 is not limited to any specific size of the “integral mounting hole,” only that it is adapted to be placed via said mounting hole on a support for the nectar type bird feeder. . . .” The size of the “support for the nectar type bird feeder” is not defined in Appellant’s claim. Appellant did not direct us to, and we do not find, size limitations for these elements in the specification. “During examination, ‘claims . . . are to be given their broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.’”

*In re American Academy of Sci. Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Thus, we do not read any size limitations into Appellant's claim.

In the Reply Brief, Appellant argued that Exhibit 3, presumably a copy of an internet order form, provides the dimensions of the center hole in a device "that appears to be equivalent to Erickson's trap member 16 . . . ." (Reply Br. 3). Whether or not Exhibit 3 is related to an embodiment of the device taught in Erickson,

'[a]ll of the disclosures in a reference must be evaluated for what they fairly teach one of ordinary skill in the art.' The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain.

*In re Lemelson*, 397 F.2d 1006, 1009 (CCPA 1968) (citation omitted). Appellant did not provide us with any evidence, from Erickson or from what was known by those in the art at time of filing that demonstrates those in the art would have known that the size of a "support for the nectar type bird feeder" differs from the size of the hole in a device described by Erickson.<sup>5</sup> Accordingly, Appellant has not convinced us that the device in Erickson has a hole too large to allow for "a means for friction fitting the coated media elastically on the support for the nectar type bird feeder."

Furthermore, Appellant argued that the Examiner was misleading in the assertion that the force holding the trap member in Erickson and the paper ring together "involves friction between the elements and therefore

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<sup>5</sup> Appellant acknowledged that "[t]he nectar feeder support, being typically a hanging cord or hook is not reliably found at some standard dimension." (Reply Br. 3 (underlining in original)).

can be considered as a frictional force.” (Reply. Br. 4, quoting Ans. 4). Appellant argued that “no competent designer would claim that the Erickson device is ‘friction fitted elastically’ on the caster.” (Reply Br. 4). Appellant provided no evidence of what “designers” would consider to support this argument. Nor did Appellant direct us to a definition of “frictional force” in the specification that would exclude the forces present in Erickson’s device. *See American Academy, supra*. Appellant’s specification refers to providing “elastic expansion and securing friction” (FF 4), while Erickson provides a rubber gasket to “stabilize the trap member . . . .” (FF6). We are not convinced, based on the record before us, that “securing” friction and “stabilizing” friction are patentably different.

Appellant also argued that “Erickson’s Insect Trap is not adequately disclosed for the adhesive to be pre-applied.” (App. Br. 8 (underlining in original)). According to Appellant, “[t]here is no enabling disclosure or teaching in the Erickson patent related to protecting the adhesively (moist glue) coated surfaces of his trap member 16 or paper ring 20.” (App. Br. 8). Appellant argued that “[i]f the Erickson trap member 16 and paper ring 20 were to be supplied with an adhesive coating, then protecting the adhesive surfaces from inadvertent contact during handling would have been a practical necessity.” (App. Br. 8-9). We note that Appellant’s claimed device does not include an element to protect the adhesive during handling, nor does Appellant’s claim require that the adhesive be “pre-applied.” Therefore, the lack of protection on the adhesive in Erickson is not a patentable distinction. Appellant also provided Exhibit No. 3 as purported evidence of the lack of an adhesive in Erickson. (App. Br. 9). As explained above, we look to the disclosures within Erickson, not outside references, in

our analysis of anticipation by Erickson. *See Lemelson, supra*. Erickson teaches that an “adhesive substance . . . may be applied to a vehicle such as a paper disk or ring 20 . . . .” (FF 5). Thus, Erickson teaches Appellant’s claim element of being “coated on at least one surface with a non-drying adhesive layer . . . .” (FF 1).

Appellant argued that “Erickson never discloses a non-drying adhesive or even a slow drying adhesive, in his patent.” (App. Br. 9). According to Appellant, an advertisement, provided in Exhibit 4, demonstrates that the device of Erickson would be used with borax, oil, or a tacky substance provided by the consumer. Erickson expressly teaches that an “adhesive substance” can be applied directly to the inner surface of the paper disk. (FF 5). Appellant has not explained why this “adhesive substance,” identified as “moist glue” in Erickson (FF 5), would not be considered to be a “non-drying adhesive layer” by those in the art.

Appellant argued that Erickson does not teach “a means for fiction fitting the coated media elastically on the support for the nectar type bird feeder,” as claimed. According to Appellant,

[t]he [claimed] insect barrier device 11 is held in place on the non-adapted feeder hook 31 by the residual elastic force (parallel or in-line with the media) exerted by the stretched mounting hole 19. In contrast, the Erickson trap member (that has a mounting hole diameter considerably larger than the diameter of the caster stem) is held in place by being sandwiched between the mating parts of the caster assembly.

(App. Br. 10). We disagree. Appellant’s claim does not limit the “means for friction fitting” to a force that is “parallel or in-line with the media.” Erickson teaches that a “flexible gasket 19, preferably formed of felt or

rubber, may be interposed between the trap member and the furniture leg 10 to stabilize the trap member in its relation to said leg.” (FF 6). Thus, even if the device of Erickson is held in place by being sandwiched between the parts of a caster assembly, Erickson teaches a rubber gasket that stabilizes the device around the leg. Appellant has not demonstrated why this gasket would not stabilize the device both in “parallel or in-line with the media,” as well as perpendicular to it. Appellant argues that the Erickson trap member “has a mounting hole diameter considerably larger than the diameter of the caster stem” (App. Br. 10), but does not point to any specific language in Erickson to support this. This gasket would provide a “means for frictional fitting the coated media elastically on the support,” as claimed.

Each element of the device recited in Appellant’s claim 1 is found in Erickson. *See Verdegaal Bros., supra*. Accordingly, the Examiner did not err in rejecting claim 1 under 35 U.S.C. § 102(b) over Erickson.

#### Rejection of claims 3-4

Appellant’s claim 3 recites: “The insect barrier device of claim 1, wherein said barrier device includes a protective covering layer of low adhesion or contact paper.” (FF 7). Appellant’s claim 4 recites: “The insect barrier device of claim 1, wherein said barrier device media has a handling region that is free from any adhesive coating.” (FF 8).

Olson addresses the problem of insect trapping adhesive that is “sticky and, therefore . . . difficult to handle. (FF 9). For example, Olson teaches a “layer of release material” that covers the adhesive layer and “prevents transfer of the second layer of adhesive . . . .” (FF 10). This “release material” is a protective covering for the insect trapping adhesive, as provided in Appellant’s claim 3. The band taught in Olson also has a



surface with a recessed area that receives the insect trapping adhesive. (FF 10). The non-recessed part of this surface, which does not have any adhesive, would be a “handling area,” as provided in Appellant’s claim 4. Because Olson provides these solutions to the problem of handling tacky adhesive in insect traps, such as those taught by Erickson, “design incentives [or] other market forces” would have prompted those in the art to combine these two references. *See KSR, supra*.

In regard to claim 3, Appellant argued

[i]t is clear from this description and Olson’s patent Fig. 3 . . . specification, column 3, lines 57-60, that the protective paper 140 is applied to the contact adhesive 130, not the insect trapping adhesive 120. This differs significantly from the present invention, where the non-drying adhesive layer 25 is protected by the direct contact of the low adhesion contact paper 23 (present application, Fig. 3, specification page 6, lines 1-3).

(App. Br. 13). Appellant’s claim 3 does not specify on which surface the “protective covering” is applied, thus the difference in placement of the release layer of Olson does not make it distinct from that claimed. Appellant also argued that “[s]ome non-drying adhesives, and especially thicker applications as specified by Olson will adhere to even the best low adhesion paper.” (App. Br. 13). Appellant provided no support for this contention, though, and did not point to specific language in Olson that would distinguish the “release layer” from the “low adhesion or contact paper” recited in claim 4. Appellant also did not direct us to, and we do not find, any description of such paper in the specification that would distinguish it from the “release layer” of Olson. Indeed, Appellant agreed that “[v]irtually, all contact adhesive coated products come with a protective

layer of low adhesion paper. It is a ubiquitous practice and a practical requirement for an almost unlimited variety of products.” (App. Br. 13-14).

In regard to claim 4, Appellant argued that

Olson’s insect trapping band does have uncoated regions 11 and 13 as can be seen in his patent Fig. 1. Olson’s patent disclosure does not identify these areas as handling regions. . . . The Examiner could identify any uncoated region on Olson’s band or any other non-drying adhesive based trap as a “handling region.” Of course it is practically impossible to expect that any non-drying adhesive type insect trapping or barrier device would be coated on every surface. The present application Fig. 1, shows a specifically adapted handling region not disclosed in the Olson or Erickson references.

(App. Br. 14). Appellant did not point to, nor do we find, any explanation in the specification that makes the claimed handling region “specifically adapted,” other than by the lack of adhesive coating. Given the lack of distinguishing language in the claim and Appellant’s agreement that insect trapping or barrier devices would not be expected to be coated on every surface, we do not find Appellants argument convincing.

Appellant also argued that “even when [Erickson and Olson] are combined, these references are not suggestive or practically adaptable for the application of protecting nectar feeders from ant contamination.” (App. Br. 14). The Supreme Court has recently held that “[a]s our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 127 S.Ct. at 1741. Thus, neither Erickson nor Olson need address the problems of protecting nectar feeders from ant

contamination for their teachings to be combined in rendering the claimed device obvious.

To rebut the Examiner's prima facie case for obviousness, Appellant argued that "despite the long felt need for a (low maintenance, non-insecticide based) insect barrier device for preventing ant contamination of nectar type bird feeders – as discussed in detail in the instant application Background of the Invention – no one has adequately solved this problem." (App. Br. 14). Appellant presented "two tables with a listing of patents as evidence to support that those skilled in the art, have continually tried to solve the ant contamination of nectar feeder problem." (Reply Br. 10). Appellant also presented "a small sample of the commercial products for keeping ants out of nectar feeders . . ." and concluded that "[n]one of the prior art patented devices or commercial devices uses or suggests the use of a non-drying adhesive." (Reply Br. 11 (underlining in original)).

As we understand the evidence presented by Appellant, it relates to the use of non-drying adhesive in a nectar feeder. The Examiner rejected claim 1, which recites that feature, under 35 U.S.C. § 102(b), asserting that the claimed subject matter was anticipated by Erickson. "If the rejection under § 102 is proper . . . appellant cannot overcome it by showing such unexpected results or teaching away in the art, which are relevant only to an obviousness rejection." *In re Malagari*, 499 F.2d 1297, 1302 (C.C.P.A. 1974).

To rebut the rejections of claims 3 and 4, which were made under 35 U.S.C. § 103, Appellant must provide evidence that the inclusion of a "protective covering layer" and a "handling region" solved a previously unsolved and long-felt need of those in the art. *See, In re Kahn*, 441 F.3d

977, 990-91 (Fed. Cir. 2006) (“our precedent requires that the applicant submit actual evidence of long-felt need, as opposed to argument. This is because ‘[a]bsent a showing of long-felt need or the failure of others, the mere passage of time without the claimed invention is not evidence of nonobviousness.’ *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004)”). Appellant did not direct us to such “actual evidence,” beyond the “mere passage of time.” Furthermore, in light of Appellant’s statements that “[v]irtually, all contact adhesive coated products come with a protective layer of low adhesion paper” (App. Br. 13), and that “it is practically impossible to expect that any non-drying adhesive type of insect trapping or barrier device would be coated on every surface” (App. Br. 14), we do not find Appellant’s arguments that long-felt and unsolved needs were met by the subject matter of these claims to be persuasive.

Accordingly, the Examiner did not err in rejecting claims 3 and 4 under 35 U.S.C. § 103(a) over Erickson and Olson.

#### Rejection of claim 19

Appellant’s claim 19 recites: “The insect barrier device of claim 1, wherein said disposable media is elastic.” (FF 11). Olson discloses a band for trapping insects that carries an adhesive and would be used, for instance, on a tree trunk. (FF 12). When the band is wrapped around a tree trunk, as depicted in Figure 6 of Olson (FF 13), it forms a “mounting hole” through which the trunk extends. The band of Olson is covered on one surface (FF 11) with an adhesive that is tacky (FF 14). This band would be “friction fitted” on the trunk. Olson teaches that the band is made of “flexible material and foam material, such as, polyurethane or non-woven polypropylene . . .” (FF 15), though this material is not expressly identified

as being “elastic. The Examiner asserted that “it would have been obvious to employ an old and well known elastic material to wrap around a tree so that the barrier can be compressed in size when not applied to a support.” (Final Office Action 4).

Appellant points to the teaching in Olson that

many trees have rough and uneven surfaces. The flexible, pliable nature of the material of strip 10 will conform to the tree surface and insects will be prevented from passing under the strip and forced to pass over the exposed surface where they will come into contact with adhesive 20.

(FF 16). According to Appellant,

It is not desirable for the trapping band 10 to be “elastic” as this property may result in the end user stretching the band when installing it on a tree. Any elastic stretching of the trapping band during installation will tend to make the band bridge over the surface irregularities and contour depressions that are typical of many trees. This loss of surface contact between the band and the tree (allowing insects to pass under the band) is exactly what Olson is trying to avoid.

(App. Br. 12). Appellant also argued that the “proposed stretching of [Olson’s] insect trapping band to facilitate compact storage is not advised - since it may result in the disruption of the insect trapping adhesive 20 and could result in the adhesive running out of the recessed groove 15.” (App. Br. 12).

We are not convinced that the band disclosed in Olson is not elastic<sup>6</sup> or would not have been modified by those in the art to have a degree of elasticity. There are no limitations in claim 19 on the degree of elasticity of the media or the extent of the contact the disposable media makes with the support. Because we give claims their broadest reasonable interpretation, *see American Academy, supra*, we do not read any limitations on the degree of elasticity into Appellant's claim. Thus, those in the art would find it obvious to make the band taught in Olson of a material that is elastic enough to provide a secure fit around the trunk, but not so elastic that it cannot conform to the "surface irregularities and contour depressions that are typical of many trees." (App. Br. 12).

Accordingly, the Examiner did not err in rejecting claim 19 under 35 U.S.C. § 103(a) over Olson.

## **V. ORDER**

Upon consideration of the record and for the reasons given, the Examiner's rejection of claims 1, 2, 5, and 18 under 35 U.S.C. § 102(b) over Erickson is AFFIRMED; the Examiner's rejection of claims 3 and 4 under 35 U.S.C. § 103(a) over Erickson and Olson is AFFIRMED; and the Examiner's rejection of claim 19 under 35 U.S.C. § 103(a) over Olson is AFFIRMED.

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<sup>6</sup> We understand that polyurethane can have some elasticity. *See e.g.* U.S. Patent 6,468,652, "Elastic polyurethane-urea fiber and method for producing the same."

FURTHER ordered no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

rvb

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